NO. 12532

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POTLATCH FORESTS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR POTLATCH FORESTS, INC., RESPONDENT

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STATEMENT OF FACTS

The International Woodworkers of America, C.I.O., and four constituent locals (10-119, 10-358, 10-361, and 10-364) having members among the employees of the bargaining unit in Respondent's operations are recognized jointly as the bargaining agent or Union for the production and maintenance employees. (R. 28)[1]. In 1945 and

[1] The printed record is designated "R". References preceding the semicolon, if one appears, refers to the Board's findings; succeeding references are supporting testiomny or evidence. Exhibits of the General Counsel are referred to as (G.C. Ex.); those of Respondent as (Res. Ex.).

again in 1946 a collective bargaining agreement, known as the Master Working Agreement, was executed by the Union and the Respondent. (R. 28; Res. Ex. 1, G.C. Ex. 2).

On August 7, 1947, the Union called an economic strike, viz, a strike which was not the result of any unfair labor practice on the part of Respondent, for the purpose of securing a wage increase. (R. 30; 3, 4, 10, 103). Starting about the end of August, employees began to return to work. Respondent hired some new employees and by October 10, 1947, some 1750 employees were working in the Bargaining Unit which normally has a complement of about 2600. (R. 31).

With the strike lost the Union requested a meeting to discuss a settlement. Meetings were held between "top officials" of the International Union and "top management officials" of Respondent. (R. 31, 260-261, 264). During the October 10th meeting the Union submitted a draft of a proposed memorandum of settlement in the same form as later initialled by the parties, except it provided the former employees were to "return to work without discrimination *and without loss of seniority.*" (R. 47; 265). The Respondent refused to agree to it because it would have established full seniority for the strikers without protecting the employees who had returned to work. (R. 265, 277, 305). The officials of the Respondent had pointed out the strikers had lost their vacation rights and the company agreed to rewrite the contract so they would be eligible. (R. 268, 294). The Respondent also agreed to protect the Seniority of the strikers for promotion. (R. 268). It would not agree to *protect* the strikers seniority for purposes of displacing

employees who had returned prior to October 13. (R. 269, 277, 284, 285, 330). It was pointed out this would have no major effect until there was a serious curtailment. (R. 48, 267-268, 284-285, 287). After the discussion the Union negotiators retired and returned shortly with the words "and without loss of Senitority" stricken from the draft. (R. 48, 266, 286, 305). On October 12, 1947, the proposed draft with the striken clause removed, was dated and initialled by Respondent's Vice-President and General Manager and the first Vice-President of the International Union. (R. 33-34, 261, 264, 288). On October 13th a group of Respondent's high management officials, including the two officials who represented the Respondent during the negotiations, drafted the "Return-to-to-Work Policy". (R. 34, 245, 328-330, 334). The Return-to-Work Policy has been maintained and followed since that time. (R. 36; 247-249). The memorandum of the settlement (R. 32; 106) and the Return-to-Work (R. 34; G.C. Ex. 5) read as follows:

> "As a basis for settlement of the present dispute between the I.W.A. and the Potlatch Forests, Inc., the following is proposed:
>
> 1. The Union agrees to withdraw its demands for a 7½c wage increase to eliminate the differential. Wages to remain at rates as of August 6, 1947. Picket lines to be withdrawn as of October 13, 1947.
>
> 2. All former employees of the Potlatch Forests, Inc., will return to work without discrimination, on Monday, October 13th. Former employees shall return to work by October 22, to protect their

job rights. In the event the job formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job.

3. Men previously on gypo basis will be assigned to gypo work if still available. If gypo work is not available, pay will be at the rate shown in wage schedule for the job.

4. The Company has informed the Union that the night shift of the box factory in the Clearwater Mill, cannot be started at this time, due to business conditions, and for that reason, it may not be able to employ all of the former box factory workers immediately. These box factory workers will be given preference over new employees in filling vacancies in other departments.

5. The present contract will remain in effect without change, except that the following is substituted for the 4th paragraph in Article VII.

"As a condition of continued employment, every employee who confirms, to the Company through the Union, his membership in the Union as of November 20, 1947, or becomes a member of the Union after November 20, 1947, shall be required to maintain his membership in good standing." Dates added 10/12/47.

C. L. B.
W. B.
O. H. L.

Potlatch Forests, Inc. — Return to Work Policy.

"Employees who returned to work October 13th to 22nd inclusive, 1947, will in case of *curtailment,* be laid off ahead of employees who returned to work or were hired on or before October 12, 1947, (settlement date). The order of layoff in each group will be based on each person's previous seniority rights.

Employees who returned to work on or before October 12, 1947, re-established their previous seniority for *all purposes.* Employees who returned to work October 13, to October 22, inclusive, 1947, re-established their previous seniority for purposes of *curtailment as among this group* (returned October 13 to 22, incl.), and for training and *promotion among all groups.*

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

When an employee, who is on the job convenience rate, is offered a job equal to or paying more than his old job's rate and this opportunity is passed up the employee's rate will revert to the job he holds but shall be given an opportunity to return to his old job when it is open. If he passes

up the opportunity he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is promoted to a higher paying job and then there is a curtailment he returns to the job his seniority entitles him to and at that job's rate—not at the job convenience rate from which he was promoted.

Employees who returned to work on or before October 22, 1947, will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work after October 22, 1947, will be classed as new employees."

The strike was terminated and the balance of the men started returning to work October 13, 1947. The Union was aware the Respondent was maintaining the policy whereby the striking employees returned with impaired seniority. (R. 37, 109-110, 146-147, 279-281). Shortly after the strike,[2] grievances were filed over the seniority of the railroad employees and processed through all steps of the grievance procedure, including conciliation, with the Respondent maintaining the Return-to-Work Policy (Ibid).

The Master Working Agreement expired May 1, 1948. However, the expired agreement as modified by the memorandum of settlement and the Return-to-Work Policy was followed by the Respondent until April 1, 1949. (R. 39-40).

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[2] The grievances introduced by General Counsel (Ex. 6A through 6G) show dates as early as October 16, 1947.

In December, 1948, and January, 1949, pursuant to the Return-to-Work Policy on curtailment, Respondent transferred, among other employees, Cloninger and Walters to other departments while retaining others in the department who had returned prior to the termination of the strike (October 12, 1947) but who had less pre-strike seniority. (R. 40-45).

On February 16, 1949, a charge was filed by the Union, signed by the Vice-President of the International, alleging 8 (a) (1) (3) and (5) violations (G.C. Ex. 1A). This charge was amended March 18, 1949, alleging 8 (a) (1) and (3) violations only (G.C. Ex. 1D) and was again signed on behalf of the Union by the International Vice-President. The complaint was issued June 24, 1949. Respondent admitted the Return-to-Work Policy was being maintained but denied it was a violation of the Act, as amended. (R. 8-16). In addition it urged by appropriate and timely pleadings and motions that the proceedings were barred under Section 10 (b) of the Act, as amended, which states no complaint shall issue based upon an alleged violation occurring more than 6 months prior to the filing and serving of the charge and further, that the Board was without authority to issue the complaint by reason of the Union being in non-compliance with Sections 9 (f), (g) and (h) of the Act, as amended (R. 17, 19; 336-337).

Respondent had been maintaining and following the Return-to-Work Policy, with the knowledge and acquiesence of the Union, for more than 6 months prior to the filing of the charge. (R. 37; 109-111, 146-147). With respect to the status of the Union, the record shows the International and two of the four locals were in com-

pliance, and the other two locals had not complied with the Act, as amended. (R. 85).

The Board overruled Respondent's motions. (R. 86, 336-337). It further found the two employees, Cloninger and Walters, had been offered other jobs in other departments and had been later, but prior to the hearing, restored to their former jobs, so neither reinstatement nor back pay was ordered. (R. 63-64). The Board on December 21, 1949, ordered Respondent to cease and desist maintaining and giving effect to the Return-to-Work Policy. (R. 80).

The Petitioner seeks enforcement of its order by this court. The issues before this court are the rulings of the Board on the motions of the Respondent, the appropriateness of the order and whether the Return-to-Work Policy is a violation of Sections 8 (a) (3) and (1) of the Act, as amended.

SUMMARY OF ARGUMENTS

I.

The National Labor Relations Board erred in finding that the Respondent by inaugurating and maintaining its Return-to-Work Policy (R. 34-35) discriminated against its employees in violation of Section 8 (a) (3) and (1) of the Act. The strike settlement (R. 32-33) provided that employees who had returned to work prior to the strike settlement could not be displaced by the employees returning after the settlement. The Return-to-Work Policy protected the employee who had returned to work prior to the settlement guaranteeing to him that the position he accepted would be permanent. It provided

that the men returning after the date of settlement could not displace him from his job on the date of their return or on the date of any subsequent curtailment. The Return-to-Work Policy did not differentiate between union and non-union employees. The method of selection for lay off is that of seniority between two groups voluntarily established by members of each group in lawful exercise of their respective right to work or to strike and without any unfair labor practice having been committed by Respondent. The policy does not interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act. The policy did not and does not encourage or discourage membership in any labor organization, and the findings to that effect are not supported by substantial evidence.

II.

The National Labor Relations Board erred in failure to dismiss the complaint on the grounds the policy and practice complained of was established by agreement with the union officials who settled the strike and was maintained and followed with knowledge and acquiescence of the Union for over six months prior to the filing of the charge upon which the complaint was based and therefore barred under Section 10 (b) of the National Labor Relations Act, as amended.

III.

The Bargaining Agent filing the charge was not in compliance with Section 9 (f), (g) and (h) of the National Labor Relations Act. Therefore, it was disqualified from using the processes of the Board and the complaint should not have issued.

ARGUMENT

I.

The Board erred in finding Respondent violated Section 8 (*a*) (3) *and* (1) *of the amended Act by following a Return-to-Work Policy which prevented displacement of an employee who went to work during the course of an economic strike*[3] *by an employee who did not return until after the strike was settled.* The strike was not caused or prolonged by any unfair labor practice of the Respondent. (R. 30-31).

The Board's order is directed to the maintaining and giving effect to that policy by ordering the Company to cease and desist. (R. 81). Insofar as employees Cloninger and Walters are concerned, the Board found neither was entitled to back pay and that they had returned to their old jobs prior to the hearing. There is no issue before this court concerning any specific individual. The issue is whether the Return-to-Work Policy of the Respondent is an unfair labor practice. (R. 63-64, 79-81).

Paragraph 2 of the initialed memorandum of settlement (R. 32-33) provides as follows, to-wit:

> "All former employees of Potlatch Forests, Inc. will return to work without discrimination, on Monday, October 13. Former employees shall return to work by October 22nd to protect their job rights. In the event the job formerly held by the returning employee is not open, the employee will be given other work and will receive pay on

[3] The term "economic strike" is descriptive of a strike not caused or prolonged by any unfair labor practice by Respondent as distinguished from an "unfair labor practice strike" caused or prolonged by an unfair labor practice.

the basis of the rate paid on his former job." (R. 32-33).

The Return-to-Work Policy (R. 34-35) adopted by the Respondent immediately following the strike settlement, was based on the initialled memorandum of settlement and the negotiations leading up to the settlement. The substance of that policy is that employees who returned to work October 13, 1947, to October 22, 1947, inclusive, retained their previous seniority for all purposes except they could not displace an employee who returned to work or was hired during the course of the economic strike. Employees who did not return to work on or before October 22 were classed as new employees.

The Petitioner does not question the validity of paragraph 2. (Supra). The interpretation by the Board in simple terms means that an employee who returned October 22nd could not displace an employee who returned to work prior to October 13, but in the event of a curtailment on October 23rd he could displace that employee. Such a construction is not reasonable, logical or founded in fact.

The intention of paragraph 2 is clear. Employees who returned to work prior to October 13, the date the strike ended, would be protected in their jobs. In other words, no employee returning after October 12th, could displace employees who had returned to work or were hired during the economic strike. The record is clear and the Board so found that the paragraph originally contained the words, "without discrimination and without loss of seniority." (R. 47-48). The record is also clear that the negotiators for the Union retired and struck out the words, "and without loss of seniority" after the negotiators for

the Respondent pointed out that the employees who were then working would not be protected against displacement by returning workeres. (R. 47-48).

Respondent agrees that Section 2 (3) of the amended Act, defines the term "employee" to "include any individuals whose work has ceased as a consequence of, or in connection with, any current labor dispute." Even though an individual on economic strike remains an employee under the statute, it does not follow that his status as an employee during or after the strike is or will be the same as prior to the strike. Such individuals remain employees for the remedial purposes specified in the Act only. N.L.R.B. v. Mackay Radio and Telegraph Company, 304 U.S. 333, 2 L.R.R.M. 610, at 615. The Court in that Case further stated that an economic striker may be replaced during an economic strike. The Court said:

> "The assurance by Respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

The facts in the case at bar show that of 2600 economic strikers 1750 had returned to work prior to October 12, 1947. (R. 31; 262-263). All employees who had not returned by October 12th were permitted to return prior to October 23 and was assured a job at his old rate of pay. In other words, the employee who returned prior to October 12th was given assurance that he would not be displaced and the employee returning after October 12 and prior to October 23 was given the assurance of a job at his old rate. To clarify the issue and the respective

positions of the parties we submit this problem: Employee A returned prior to October 12th and was given a job of setter. On October 22nd, employee B who held that job prior to the strike returned. There was no opening at that time in the position of setter so B was given a lower rated job but paid at the setter's rate of pay. A week later, due to business conditions, a layoff was necessary. Employee B was originally employed by Respondent before employee A. It is the position of the Petitioner that employee B could now displace employee A. It is the position of the Respondent that employee B could not displace employee A and could displace only those employees among the group who returned after October 12th who were junior to him. Any interpretation other than that of the Respondent is inconsistent and wholly illogical with the initialled memorandum of settlement and the negotiations surrounding the elimination of the words, "without loss of seniority". Paragraph 4 of the settlement memorandum (R. 33) also shows the intent of the negotiators in connection with seniority on curtailments. The settlement made no differentiation between the then immediate curtailment in the Box Factory and a future curtailment. Paragraph 4 specifically provided that due to business conditions the Respondent may not be able to employ all the former box factory workers immediately. They could not displace other employees in other departments under curtailment seniority practices the Petitioner insists should be applied. There is no logical reason to support the position that in a future curtailment they could displace employees who they could not displace during the present then existing curtailment.

The Mackay Radio Case (Supra) does not hold, as contended by Petitioner, that an employer must reinstate an economic striker upon the termination of the strike if there is a vacant place which he can fill. That case merely holds an economic striker remains an employee for the remedial purposes specified in the Act. (See also N.L. R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240). In that case an economic strike was called. Some of the employees had returned to work and 11 employees had been transferred from other operations with the assurance their positions would be permanent if they so desired. The company then made up a list excluding 11 strikers who the company said would have to file applications for reinstatement. It developed only 5 of the new men transferred desired to stay. Of the original list of 11, the 5 strikers who were most prominent in the activities of the Union and the strike were not reemployed and told their activities made them undesirable to the company. The Court found they were discriminated against for that reason. The Court did point out the company might have refused reinstatement on grounds of skill or ability or it might have resorted to any one of a number of methods of determining which of its striking employees would have to wait. The unfair labor practice remedied in the Mackay Case was the discriminatory method of selection from among a group of strikers. It is a reasonable inference to assume that had the selection been made from the group remaining on strike on the basis of their seniority the court would have found no unfair labor practice to remedy. In the case at bar all employees still out on strike were permitted to return to work regardless of whether they were members of the

Union or had actively participated in the strike. In the case at bar there was no selection or segregation or making a choice among employees who were still out on strike. Regardless of union membership, regardless of activity in the strike itself, all the employees returning after October 13, returned as a group without discrimination. The Respondent in this case had assured the employees then at work, that those employees who had returned to work during the strike would not be displaced and their employment permanent. The memorandum of settlement reassured them of their jobs. The selection for lay-off in the curtailment was made from the group who returned after the strike settlement on the basis of their seniority within that group. The Return-to-Work Policy does not establish a prohibited discriminatory method of selection as was used in the Mackay Radio case.

Under the settlement each returning striker had a job at his former rate and on the same basis as all other employees in the group which did not return until after the termination of the strike. There had been no interference with, restraint or coercion of employees by the Respondent in the exercise of the rights of the employees guaranteed under Section 7 before, during or after the strike. There was no discrimination at any time by the Respondent in regard to hire or tenure of employment to encourage or discourage membership in any labor organization as prohibited by Section 8 (a) (3). In other words, there was no unfair labor practice in connection with the labor dispute.

During and after the termination of the strike there was no basis upon which the Board could order the reinstatement of the employees still remaining out on strike

"without prejudice to their seniority or other rights or privileges" as it did in N.L.R.B. v. Republic Steel Corp., 114 F 2d 820 (C. A. 3). The Union could not negotiate a reinstatement for them "without discrimination and without loss of seniority". It could only negotiate a reinstatement "without discrimination" but with "impaired seniority". Such was necessary to protect the jobs of the employees then lawfully exercising their right to work. In other words, in the event of a future curtailment to the point where Respondent needed only 1750 employees that number of employees would be the group working October 12 just prior to the termination of the strike. Such a situation would leave all parties in exactly the same status as they were on October 12th when there was no remedial action the Board could have taken. The termination of the strike left the Union and the individuals who were not working prior to the termination in the same status in which they had voluntarily placed themselves by exercising their rights under the Act and without interference or discrimination on the part of the Respondent. If the settlement and the administration of the Return-to-Work Policy under the settlement had placed the Union and those individuals in a status less favorable then the status in which they voluntarily placed themselves then a charge of discrimination in violation of Section 8 (a) (3) might be well founded. In the case at bar, the Union and the employees who returned under the settlement and the Return-to-Work Policy were not placed in a less favorable status nor has the fact that the Respondent has followed the settlement and the Return-to-Work Policy placed the Union or any employee in a less favorable status.

It was recognized that a severe curtailment was not then anticipated at the time of the settlement. Minor ones involving lesser numbers is a normal condition in an industry. The Return-to-Work Policy protected returning employees on an equal basis among a group as to which no unfair labor practice had been committed. It provides they would be laid off on the basis of their old seniority established under the Master Working Agreement as among that group. There was no discrimination on the basis of who was or was not a Union member, who was active or not active on the picket line, who was a leader or non-leader during the strike, who was violent or not violent in their activities or on any other basis other than the seniority they had as among their group. It was a grouping in which they had voluntarily placed themselves without violation of the Act on the part of the Respondent. This method of lay-off was a method resorted to which did not violate the Act. The Return-to-Work Policy processes minor curtaliments on exactly the same basis as if a major curtailment was developing that would reduce the crew to the original 1750 employees working just prior to the termination of the strike. It is a method of selection which does not violate the provision of the Act, as amended, and does not invoke the remedial powers of the Board.

The Petitioner in the case at bar relies upon the case of N.L.R.B. v. Republic Steel Corp., 114 F. 2d 820 (See same case 107 F. 2d 472) for the proposition that striking employees upon reinstatement are entitled to be "treated in all matters involving seniority and continuity of employment as though they had not been absent from work". Such is not the holding in that case. In that case there was

an unfair labor practice strike caused by most willful and flagrant violations of the Act by the employer. Because of these unfair practices the striking employees were reinstated *"without prejudices to their seniority or other rights or privileges,"* under the remedial powers of the Board. (Emphasis supplied). Under such a reinstatement by the Board the Court held they were to be treated as though they had not been absent from work. Such was not the type of reinstatement in the case at bar.

The Petitioner states the proposition that if an employer grants seniority rights he may not discriminate against employees in conferring those rights on the basis of whether or not they have engaged in a strike or other union or concerted activities protected by the Act. The point which the Petitioner has overlooked is that the seniority rights conferred by the Respondent do not interfere with, restrain or coerce employees in the exercise of their rights under Sections 7 and 8 (a) (1) or discourage membership in the Union as prohibited by 8 (a) (3) because the rights conferred would in the event of curtailment merely return the employees to the status they voluntarily chose without fault or violation of the Act by Respondent. Neither do the cases cited by the Petitioner support that proposition and they are readily distinguishable on the facts from the case at bar. The case of N.L.R.B. v. Walt Disney Products, 146 F. 2d 44 (C. A. 9), certiorari denied, 324 U. S. 877, was one of a discriminatory discharge in violation of Section 8 (a) (3) after the employee had been reinstated by arbitration on the basis that he was not to be *"subject to discharge incident to reorganization except for cause"*.

The case of N.L.R.B. v. Star Publishing Company, 97

F. 2d 465 (C. A. 9) was one in which men went on strike because of an unfair labor practice committed by the employer. The employer refused to reinstate the individuals to their regular positions and employment. The Board ordered *"immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges"*. (Emphasis supplied). Under the facts in that case the Board was justified in applying its remedial powers to correct an unfair labor practice and thereby effectuate the policy of the Act. In the case at bar, the strike was not caused by an unfair labor practice of the Respondent. The case of N.L.R.B. v. Sandy Hill Iron and Brass Works, 165 F. 2d 660 (C. A. 2) the court enforced the order of the Board. (69 NLRB 42, 18 LRRM 1219). The employer had a long history of anti-union prejudices. It reduced the working force following a strike by selecting a disproportionate number of union members for the lay-off and failed to reinstate 13 members. It cannot be said that the Board in that case was not justified in finding the method of selection for the lay-off was discriminatory for the purpose of discouraging membership in the labor organization in violation of 8 (a) (3). In the case at bar there is no charge or evidence of anti-union hostility. The method of selection is that of seniority between two groups voluntarily established by members of each group in lawful exercise of their respective right to work or to strike and without any unfair labor practice having been committted by Respondent.

The case of Polish National Alliance v. N.L.R.B., 136 F. 2d 175 (C. A. 7) was one in which members of the union went out on strike as a result of the employers

refusal to bargain with the union and other unfair labor practices. Their status was involuntary as the result of unfair labor practices. The employees then gave up their strike and made application for reinstatement. The Board, in the application of its remedial powers, ordered reinstatement of the employees and that they be made whole. As repeatedly pointed out above, such was not the facts in the case at bar where the employees were reinstated with "impaired" seniority to protect employees who had returned to work.

The case of N.L.R.B. v. Waterman S. S. Corp., 309 U. S. 206 was an 8 (a) (3) violation case. The employer discharged members of the CIO in preference to members of an A. F. of L. Union. Under the maritime law the question was raised as to whether there was a contract of employment with the individual members of the CIO Union and whether they had reemployment rights under that law. The Court in that case held that for the purpose of the Act it was immaterial that the employment of the individual is at will and terminable at any time by either party or whether it was governed by formal written agreement. In either event the Board had remedial authority to correct an unfair labor practice under 8 (a) (3) where the discrimination in tenure or other condition of employment was for the purpose of discouraging membership in a labor organization. There was ample and sufficient evidence in that case to support the findings that the tenure of employment was terminated solely because of membership in the CIO Union, and to discourage membership in that Union and encourage membership in the A. F. of L. Union. There is no such evidence

in this case as to such a purpose or that the Return-to-Work Policy of the Respondent had such an effect.

General Counsel before the Board (R. 88) stated the Board was relying upon the General Electric Case, 80 N.L.R.B. 510, (23 LRRM 1094). He further stated the complaint did not allege an independent 8 (a) (1) violation but was relying upon showing a violation of Section of 8 (a) (3). (R. 88). In a proceeding against an employer for engaging in the unfair labor practice of discrimination under 8 (a) (3) the Board has the burden of proving that the action of the employer was for the purpose and had the effect of encouraging or discouraging membership in a labor organization. A finding of the Board that the employer engaged in an unfair labor practice under Section 8 (a) (3) is not supported by substantial evidence in the absence of evidence that the act of the employer had the effect of discouraging membership in the union. Stonewall Cotton Mills v. N.L.R.B., 129 F. 2d 629 (C. A. 5), certiorari denied, 317 U. S. 667, 87 L. ED. 536. In that case the Court said,

> "It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity. To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review. N.L.R.B. v. Air Associates, 121 F. 2d 592. * * * That same burden is on it here when as petitioner seeking enforcement of its order, it seeks to point out to us that its findings

as judge, that this was established, are supported by substantial evidence."

Without violating Section 8 (a) (3) of the Act, Respondent could lawfully discriminate against economic strikers if it did not discriminate against them for the purpose of encouraging or discouraging membership in the Union. Western Cartridge Co. v. N.L.R.B. (C.A. 7) 137 F. 2d 855. It does not follow that a violation of 8 (a) (1) is a violation of 8 (a) (3) (id). Section 8 (a) (1) is a distinct and independent Section from 8 (a) (3) and for an entirely different purpose. There is no evidence of an 8 (a) (1) violation during the strike nor in adopting and maintaining the Return-to-Work Policy. The exercise of the employees' rights were in no way interfered with by Respondent. There is not one scintilla of evidence that the adoption and administration of the Return-to-Work Policy were for the purpose of or had the effect of encouraging or discouraging membership in the IWA-CIO Union. The Return-to-Work Policy and the practices thereunder in the event of a curtailment would merely return the employee to a status to which he had voluntarily placed himself prior to the termination of the strike.

Both the General Counsel and the Petitioner rely on the case of General Electric Co., 80 N.L.R.B. 90, 23 LRRM 1094, for the proposition that "except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity." That statement in that case was premised on the Mackay Radio and Telegraph Co. Case (Supra). As pointed out above under the discussion of that case, such is not the holding of the Mackay Radio case. The facts in the General Elec-

tric Company Case (Supra) show there was an economic strike. Operations had not resumed during the period of the strike. The strike was terminated and the agreement in general terms provided, "there shall be no discrimination against the employee by either the company or the union." The employer then classified its employees into two groups on the basis of their willingness to work during the strike for the purpose of granting or withholding continuous service credit for the period of the strike. Employees who indicated a willingness to work by returning to work as soon as physically possible were given service credit and paid full wages for the entire period of the strike. In that case the Board found that continuous service credit did not itself constitute compensation. Nor was it per se a condition of employment. It was simply a basis for the determination of certain real benefits, such as seniority, vacations and pensions pursuant to the collective bargaining contract in force. The Board further found, in any event, even though under the contract the strikers may have enforceful rights in other forums, it did not follow that the Respondent's treatment of the strikers constituted per se an unfair labor practice. The majority of the Board then found that while non-strikers were compensated by the accrual of vacation and retirement benefits, as well as by money wages for the period of the strike even though they did no actual work, it did not regard that as unlawful discrimination against the strikers. However, the majority of the Board then made the illogical distinction between seniority as compared to wages, vacations and pensions, and said,

> "Unlike wages, vacations and pensions, whose sole aspect is monetary compensation for work per-

> formed during the employment relationship, relative seniority, as applied in the Respondent's plants, in addition to any compensatory characteristics it may possess is one of the factors upon which the individual employee's tenure of employment may depend."

This distinction is illogical and unfounded. Wages, vacations and pensions are "conditions of employment" as is tenure. The sole value of tenure is its compensatory characteristics be they material or relative. The majority of the Board then ordered the employer to cease and desist from discouraging membership in a labor organization by in any manner discriminating against any of its employees in regard to their tenure or terms or conditions of employment. The Respondent in the case at bar particularly calls the attention of the Court to the dissenting opinion of Board member Gray. That opinion is the correct construction of the National Labor Relations Act, as amended, in its application of Sections 8 (a) (1) and (3) during strikes not caused by or prolonged by an unfair labor practice of the employer. Board member Gray dissenting in part said:

> "I concur in the majority's findings and order, except insofar as the majority finds that the modification of the seniority of the striking employees was violative of Section 8 (3) and (1) of the Act.
>
> "The right to strike is a legal, a constitutional right. It certainly is not a work-right nor a job-right. Indeed a strike is the direct opposite of work.
>
> "The accrual of seniority is one of the incidents

of actual employment, no less than the wages received by the standby employee the denial of which wages to the striking employees the majority finds to be non-discriminatory. The principal value to an employer of an employee is his continued willingness to perform on the job, doing the work he is hired and paid to do. I cannot understand how an employee can earn credit for time during which he is required to be 'ready and willing to work' while he completely nullifies that condition by refusing to work.

"The Employer's practice of not here crediting seniority is not, in my opinion, to be considered as a penalty on the strikers. Rather, as in the case of loss of wages during the period in question, it is one of the economic risks assumed by the *employees who engaged in a strike not caused by unfair labor practices of their Employer.*

"I would, therefore, dismiss the complaint in its entirety." (Emphasis added).

The majority of the Board in the General Electric Case misconstrues the holding in the Mackay Radio Case (Supra) and the Act, as amended. When employees undertake a strike not caused by any unfair labor practice of their employer they assume the risks. They can enlist the aid of the Board for remedial purposes only. If they cannot seek the remedial aid of the Board then it can be said they, and not the employer, have severed or impaired their employment relationship with the employer. Such is the case before the Court.

The Supreme Court of the United States in the recent

case of Aeronautical Lodge v. Campbell, 337 U. S. 521, held that seniority rights derive their scope and significance from contracts and not fro mthe mere fact of employment. Seniority rights are not independent and self-existing rights. At the time of the curtailment effecting Cloninger and Walters, the Board found the Master Working Agreement containing the seniority clause was in effect because it was being followed and not because it had been extended by agreement. (R. 39-40). The Board further found, and it was so stipulated, (R. 36; 247-249) that the Return-to-Work Policy and the seniority principles set out therein were likewise being maintained and followed during the same period of time. In other words, if there was a contractual basis covering seniority as contended by the Petitioner it encompassed the seniority provisions of the expired 1946 Master Agreement as modified by the memorandum of strike settlement and the Return-to-Work Policy. These reinstated the economic strikers without discrimination but with impaired seniority whether they be Cloninger and Walters, whether they be union or non-union employees instead of on a basis of "without discrimination and without loss of seniority".

There is a total failure of proof that the action of the Respondent was for the purpose or had the effect of encouraging or discouraging membership in the union in violation of Section 8 (a) (3) as required by Stonewall Cotton Mills. (Supra). There was no unfair labor practice by Respondent causing or prolonging the strike. Impairment of seniority was one of the risks assumed by the employees who engaged in a strike not caused by an unfair labor practice of the Respondent. The only parties re-

sponsible for the impairment of the employment relationship was the IWA-CIO Union and the employees who did not return to work to protect their seniority rights prior to the termination of the strike. It is not a question of whether the bargaining representative may lawfully waive statutory rights of the employees. It is a situation where the union was unable to negotiate full reinstatement of economic strikers. The Board erred in issuing a cease and desist order directed to the maintaining and giving effect to the seniority policy and practices set up under the Return-to-Work Policy of the Respondent and this Court should decline to enforce the order.

II.

The complaint sould have been dismissed for the reason that it was issued on an alleged unfair labor practice occurring more than six months prior to the filing of the charge.

Section 10 (b) of the National Labor Relations Act reads as follows:

> "(b) Whether it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more*

than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19 1934 (U.S.C. title 28, Secs. 723-B, 723-C). (Emphasis supplied).

The facts in this case disclose that Respondent established and placed in effect the Return-to-Work Policy (R. 34-35) on October 13, 1947, the day following the strike settlement and it was so stipulated by all parties. (R. 34; 247-248).

The General Counsel in the footnotes of his Brief cites several cases in support of his position that continuation of the Return-to-Work Policy constitutes an unfair labor practice under the Act (Pages 31 and 32 of Petitioner's Brief). However, the cases do not support him. If the court will examine the cases cited it will find that the holding in all of them is to the effect that the National Labor Relations Board may consider events occurring prior to six months before filing the charge as background which imparts meaning to events occurring within the six months period.

As a matter of fact Respondent is upheld in the case of Superior Engraving Company vs. N.L.R.B. (C.A. 7) decided June 27, 1950, (26 LRRM 2351). On page 2356 Circuit Judge Lindley said:

> "Examining the second amended charge in the light of our conclusion that the limitations period was operative with respect to all charges filed after the Act's effective date, it is evident that the allegations therein concerning petitioner's interrogation of its employees and its promises of benefits to such of them as would refuse to join or would withdraw from the Union, these acts having occurred 'since on or about October, 1943,' could not serve as the basis for the issuance of an unfair labor practice complaint in February, 1948, the date of the amendment of the Board's complaint herein."

The Board found the Union was aware of the Return-to-Work Policy shortly after the strike settlement (R. 37; 109-111, 144-147) and at least as early as December, 1947. The Petitioner then argues that the Board did not

find Respondent engaged in an unfair labor practice by inaugurating the policy but "by continuing to maintain it," (Petitioner's Brief 31) and that the discrimination was pursuant to a policy, rather than an isolated act. (Petitioner's Brief 33). The order of the Board is directed to the maintaining and giving effect to the Return-to-Work Policy only. (R. 80). That policy had been maintained since October 13, 1947, and acquiesced in by the Union and its local representatives since at least December, 1947. The reasons whyy it acquiesced to the application of the policy is immaterial. The admitted facts by the record show that it did for a period of some 14 months prior to the filing of thecharge. Section 10 (b) of the Act is a substantive bar to the charge that the policy cannot now be maintained. It also should be pointed out that if the broad general order of the Board (Supra) is valid and enforceable by this Court an unfair labor practice to support such an order could have been filed as early as December, 1947. The statute had begun to run at least by that date. The Board erred in not dismissing the complaint based on a charge filed February 6, 1949, and amended March 18, 1949.

III.

The National Labor Relations Board erred in not dismissing the complaint for the reason that the bargaining agent, composed of four local unions and the International union, cannot have access to the processes of National Labor Relations Board when two of the local unions had not complied with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

Sections 9 (f), (g) and (h) of the Act provide:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under sub-section (c) of this section, no petition under section 9 (e) (1) shall be entertained, and *no complaint shall be issued pursuant to a charge made by a labor organization* under sub-section (b) of section 10, *unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constitutent unit* (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, title, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each suchofficer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (a) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members

are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws, showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursement made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of

Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by sub-section (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in sub-section (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constitutent unit has complied with its obligation under this sub-section.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under sub-section (c) of this section, no petition under section (9) (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or internationel labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member

> of or support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

The General Counsel for the Petitioner in the opening of the proceedings before the Trial Examiner (R. 85) stated that "two of the four locals are not in compliance."[4]

The Counsel for the Respondent moved (R. 86) to dismiss the complaint on the grounds that the complaint did not allege compliance with Section 9 (f), (g) and (h), and, therefore the Board lacked jurisdiction.

This motion was later renewed (R. 336-337) and upon the further grounds that the Board must allege and prove compliance with such section and that the Board had not alleged or proven the fact of compliance but had, on the other hand, admitted that two locals of the Bargaining Unit actually were not in compliance.

The Trial Examiner in ruling on the motion said: (R. 86).

"Trial Examiner Leff: In other words, it is your contention that that is a jurisdictional requirement of the Act and it is incumbent upon the General Counsel both to plead and prove compliance?

"Mr. Elder: That is right.

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[4] In the footnote 17 on page 35 of Petitioner's Brief it is stated the Board's record show the two noncomplying locals subsequently complied. Respondent states that as late as July 11, 1950, in case 19-UA-2043 the petition of the Union was dismissed for failure of the Union to comply with the requirements of the Act, as amended.

"Trial Examiner Leff: I would have thought that there was considerable merit to your position except that the Board has ruled otherwise. I have had the matter up before and I know that the Board has ruled that it is an administrative matter.

"Mr. Merrick: It is an administrative matter.

"Trial Examiner Leff: That need not be pleaded or proved, consequently, I shall deny your motion. The record will show my denial of the motion. If you want to raise the matter in court, of course, you have an opportunity to do so."

The testimony and evidence in the proceeding show and Counsel for the Petitioner admits that the Bargaining Unit representing the employees of the Respondent consists of four local unions and the International. The collective bargaining agreement (G. C. Ex. 2, R. 94-95) provides in part as follows:

> "This master agreement entered into effective this 1st day of April, 1946, between Potlatch Forests, Inc., hereinafter known as the Company, and Local No. 358, Pierce, Idaho; Local 361, Elk River, Idaho; Local 119, Coeur d'Alene, Idaho; and Local 364, Lewiston, Idaho, International Woodworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter known as the *Union*. (Emphasis supplied).
>
> "The Company recognizes the *Union* as the sole collective bargaining agency for its production and maintenance employees as certified by the National Labor Relations Board. It agrees to negotiate with a committee selected by these employees who are members of said International Woodworkers

of America, Local 358, Pierce; Local 361, Elk River; Local 119, Coeur d'Alene; and Local 364, Lewiston, their representatives or agents." (Emphasis supplied).

The Petitioner argues that Respondent fails to differentiate between a complaint issued under a charge of an unfair practice which prays for an order to cease and desist from discriminating against its employees and a complaint praying for an order for it to cease and desist from refusing to bargain; or a proceeding for certification of a non-complying union. The Examiner took the same position in support of his intermediate report and further stated that the question of compliance is a matter for administrative determination; it is not a litigable issue and need not be pleaded or proved. (R. 24-25, footnote 1).

There is no such distinction in the statute. As a matter of fact, Section 9 (h) quoted above is very clear when it says, "*** no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10.***" (Sub-section (b) of Section 10 appears in full on page 41-42 of Petitioner's Brief).

In support of his position the Trial Examiner refers (R. 25) to the matter of the United Engineering Company, 84 NLRB 10, (24 LRRM 1213, 1214). On examining this case we find the complaint was based upon a charge signed by an individual, not a union. The Board in deciding that case found in effect that it was immaterial that the employee was a member of a non-complying union and the fact that the union might derive some benefit was immaterial. However, in the present case the union signed and filed the charge—Section 9 (f), (g) and (h) apply to unions not individuals.

Where the collective bargaining history shows that the collective bargaining agreements were entered into and signed on behalf of both the International and the local Unions, both must be in compliance with the act. Lynchburg Gas Company, 80 N.L.R.B. 184, 23 L.R.R.M. 1218, Magnolia Petroleum Company, 78 N.L.R.B. 163, 22 L. R.R.M. 1343.

In the recent case of Prudential Insurance Company of America, 81 N.L.R.B. 48, 23 L.R.R.M. 1331, the Board held that the participation of an International Union in an election was conditioned upon the full compliance with the Act by each of the respective local unions which individually or jointly with such International engaged in collective bargaining in behalf of the employer's industrial agent in the 31-state unit found appropriate for bargaining. The Board clarified this provision of its order in the following language quoted from that decision:

> "Their (International Union) participation in the election, however, is conditioned upon the full compliance with Section 9 (f), (g) and (h) of the Act by *each of their* respective local unions which have members *among the employees of the Employer within the 31-State unit herein found appropriate.*
>
> "Matter of United States Gypsum Company, 77 N.L.R.B. 1098 (22 LRRM 1127); Matter of Lane-Wells Company, 77 N.L.R.B. 1051 (22 LRRM 1114). Contrary to the assertion of our dissenting colleague, we believe that these cases stand for the proposition that, where there is in existence a local having members in the appropriate unit, its compliance is required without regard

to the extent to which it may participate in collective bargaining. *In any event, we believe that such a doctrine is required in order to effectuate the policy of Section 9 (f), (g) and (h) of the Act.*" (Emphasis supplied).

The U. S. Court of Appeals for the Fourth Circuit in the case of N.L.R.B. v. Highland Park Mfg. Co., decided September 2, 1950, 26 LRRM 2531, was of the same opinion and held:

> "We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that the power of the Board may not be invoked by a labor organization unless there is on file the affidavits which the statute requires executed 'by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit'."

The U. S. Court of Appeals for the Fifth Circuit in the Case of N.L.R.B. v. Postex Cotton Mills, decided May 5, 1950, 26 LRRM 2116, said:

> "The Act contains its own definition of a 'labor organization.' Section 2 (5) (29 USCA 152 (5) ... provides; 'The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work'."

The "labor organization" in the case at bar is the

"Union" as defined in the statute and described in the collective bargaining agreement supra. The only interested parties who could invoke the processes of the Board are individuals and the bargaining agent involved. The International Union and Local 10-364 are not interested parties except to the extent they are part of a constituent unit (the Union as described in the agreement) of the labor organization. Individuals did not file the charges. The bargaining agent did. The record shows it was not in compliance with the Act, as amended, and the complaint should be dismissed.

IV.

It is respectfully submitted that the Petition for the enforcement of the Order of the Board should be denied and dismissed for the reasons and upon the grounds that the complaint was issued in violation of Sections 9 (f), (g) and (h) and 10 (b) of the National Labor Relations Act, as amended, and on the further ground that the Return-to-Work Policy maintained by the Respondent does not violate Section 8 (a) (3) and (1) of the Act, as amended.

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October, 1950.

APPENDIX I

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151 et seq.), are as follows:

Sec. 2. When used in this Act—***.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . .

RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organizations, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees

in the exercise of the rights guaranteed in Section 7; . . .

* * * * *

(3) By discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization.